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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 791

J. CARTER MILLER,
Petitioner (Intervenor),

vs.

SCOTT CUTHILL,
Respondent (Plaintiff),

ORTMAN-MILLER MACHINE COMPANY,
A CORPORATION,
Respondent (Defendant).

BRIEF OF SCOTT CUTHILL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

CONCISE STATEMENT OF THE CASE.

Because the Concise Statement of Facts submitted by J. Carter Miller, Petitioner (Intervenor), contains erroneous inferences from existing facts, conclusions, arguments, and inaccuracies, Scott Cuthill, Respondent (Plaintiff), feels it necessary that he submit the following re-statement of the facts:

On March 23, 1953, Scott Cuthill, a former employee of Ortman-Miller Machine Company, Respondent (Defendant), requested Lee M. Burkey, Jr., an attorney with offices in Chicago, Illinois, to represent him in a claim for overtime compensation against Ortman-Miller Machine Company for work performed in excess of forty hours per week for a period from April, 1951, through January 11, 1952.

The plaintiff's attorney, after obtaining as local counsel, Joseph P. Sullivan of Whiting, Indiana, filed suit on plaintiff's claim on June 2, 1953. By this time the statute of limitations had run on some of the overtime worked, so recovery was sought only for the period from June 3, 1951, through January 11, 1952.

After the suit was filed and after the plaintiff had filed a Request for Admissions, which was answered by the defendant, the plaintiff's attorney, Burkey, and James J. Richards, representing the defendant corporation, conferred in Burkey's office about the possibility of settlement. At this conference and subsequently by letters to the defendant's attorney, plaintiff's attorney pointed out the basis for the claim and explained how it had been computed.

The employer had no record of hours worked by the plaintiff, but the plaintiff's claim was supported by a running record of hours worked, which he had kept during his employment, indicating that he had worked approximately seventy hours per week during the period for which claim was made.

Early in December, 1953, as time for trial drew near, Burkey and Sullivan, plaintiff's attorneys, conferred again with Richards in Richards' office, at which time the defendant's co-counsel, Straley Thorpe, was present. At this conference, after the usual differences over the terms of settlement, an agreement was reached whereby the

defendant was to pay to the plaintiff the sum of $4,100.00 which was to cover straight time, attorney's fees, costs, and a portion of the liquidated damages allowed under the statute. The defendant's attorney also insisted that the plaintiff's claim be proven in court.

On December 21, 1953, the parties, through their respective attorneys, appeared before the United States District Court, Northern District of Indiana, Hammond Division, and after hearing the testimony of the plaintiff, the court entered judgment. The defendant corporation elected not to introduce any evidence at the hearing and consented to the entry of judgment. Thereupon, satisfaction was given and a check for $4,100.00 covering the judgment was paid by the defendant to the Clerk of the United States District Court. That sum has been held by the Clerk of the Court since that date.

The day after judgment was entered, that is, on December 22, 1953, J. Carter Miller, a minority stockholder of the defendant corporation, filed a petition to intervene, vacate consent judgment and defend on behalf of the corporation, to which the plaintiff filed a motion to strike and dismiss. Hearing was had on this issue on January 14, 1954, and on January 28, 1954, the Court granted the plaintiff's motion to strike and dismiss the petition. Thereafter, on January 30, 1954, petitioner Miller filed an amended petition for leave to intervene, vacate consent judgment and defend on behalf of the corporation, to which the plaintiff again filed a motion to strike and dismiss. After hearing arguments on this amended petition, the Court again on April 15, 1954, granted the plaintiff's motion to strike and dismiss the amended petition.

The District Court's action was then appealed to the United States Court of Appeals for the Seventh Circuit which reversed the case with directions to the Court below saying:

> "We know not what proof Appellant may be able to produce, but we are of the opinion that he should be permitted to intervene and have his day in Court." *Cuthill* v. *Ortman-Miller Machine Company*, 216 F. 2d 336.

Pursuant to this direction, the District Court heard testimony upon the petitioner's allegations on February 28, 1955, March 1, 2, 3, and 4, 1955. An additional day was later spent on oral argument.

During the course of the trial, the intervenor put in forty-one exhibits, some of which indicated that there were six other suits between Miller and the Ortman-Miller Machine Company. The petitioner called to the witness stand all of the principal parties and their attorneys in the case at bar. These were in order of their appearance on the witness stand, Nelson F. Ortman, Clarence Harney, Scott Cuthill, J. Carter Miller, Lee M. Burkey, Jr., and Straley Thorpe. The petitioner questioned these witnesses not only with respect to fraud upon the Court and the corporation, and collusion among them, but also concerning the facts surrounding Cuthill's claim under the Wage Hour Law. The Respondent's (plaintiff's) Joseph P. Sullivan was also called as the Court's witness; he also was questioned by the Court and the petitioner concerning the circumstances under which the settlement of the Wage Hour claim was made between the plaintiff and the defendant.

At the conclusion of the trial, the District Court denied the Petitioner's (intervenor's) petition, saying:

> "The Intervenor's charges of fraud and collusion between the parties and counsel cannot stand up beside this evidence of the adversary attitude of the parties and their counsel from the time the complaint was filed until their appearance in Court on Decem-

ber 21, 1953." *Cuthill* v. *Ortman-Miller Machine Company,* 12 WH Cases 630, 634*; 28 LC Par., 69,442.**

From this ruling the Petitioner (intervenor) Miller again appealed to the United States Court of Appeals for the Seventh Circuit which after hearing oral argument and receiving briefs affirmed the order of the District Court, saying:

> "This Court can find no evidence that would indicate in the slightest degree that the settlement was not legitimate. * * *"
>
> "From a careful review of all the facts and circumstances before the trial court, it must be concluded that there was substantial evidence to support the findings of fact by the District Court. The refusal to vacate the judgment and permit a defense was not an abuse of discretion."
>
> *Cuthill* v. *Ortman-Miller Machine Company and J. Carter Miller,* 249 F. 2d 43.

The petitioner in his Concise Statement of the Case to this Honorable Court has again alleged that Respondent Cuthill joined a "conspiracy" and that he submitted a "fictitious memorandum" as evidence of his overtime hours. There is no proof that Cuthill joined in any "conspiracy" for any purpose whatsoever; to allege such a fact now is improper and wholly beyond the record. Moreover, Cuthill's claim is not based upon any "fictitious memorandum," but upon his personal record of hours worked which the United States District Court considered to form a proper basis for settlement of his overtime claim.

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* Wage and Hour Cases, published by the Bureau of National Affairs, Washington, D.C., hereinafter cited as 12 WH Cases 630.

** Labor Cases, published by Commerce Clearing House, Chicago, hereinafter cited as 28 LC Par. 69,442.

ARGUMENT.

A. The Court of Appeals for the Seventh Circuit Does Not Have a Duty to Conduct an Independent Investigation of the Facts Surrounding the Alleged Fraud.

While the Respondent does not contend that the Court of Appeals may not take whatever steps, in its discretion, it believes necessary to protect itself from fraud, he submits that there was no fraud upon the Court of Appeals and that all it was called upon to decide was whether the U. S. District Court erred in deciding that no fraud had been perpetrated on it—the District Court.

In determining grounds for relief under Federal Rules of Civil Procedure Rule 60(b), the question has arisen as to whether or not a judgment of a lower court should be set aside for fraud. The courts have held that the burden of proving fraud and misrepresentation in obtaining a judgment is on the movant, and that fraud is not presumed, but must ordinarily be proven by clear and convincing evidence. *In the Matter of Haddon* v. *Rumsey Products, Inc.*, 96 F. Supp. 988, 993; *Fiske* v. *Buder*, 125 F. 2d 841.

In *Assman* v. *Fleming*, 159 F. 2d 332, there was an appeal to the United States Circuit Court of Appeals, 8th Circuit, on a matter very similar to the case at bar, where an appellant, after testimony was taken in the court below on his allegation that a consent judgment should be set aside on the grounds of fraud and misrepresentation, sought reversal on several grounds among which was that the court erred in failing to try the case on its merits. In overruling the appellant's amended petition and supplemental motion to vacate judgment, the court said:

> "The findings of the court are presumptively correct and should not be reversed unless clearly erroneous. It was within the province of the trial court to pass upon the credibility of the witnesses and the weight to be given to their testimony. *Jackson County* v. *Dufty,* 8 Cir., 147 F. 2d 227; *Kincade* v. *Mikles,* 8 Cir., 144 F. 2d 784. The order of the trial court, being sustained by substantial evidence, could not be held to be an abuse of discretion. Conceding, as the trial court did, that defendant's proffered answer pleaded a meritorious defense, *defendant is without standing here because the court has found that his charges of fraud and misrepresentation were untrue* [italics ours], and it is not the province of this court to weigh the evidence nor to attempt to pass upon the credibility of witnesses. The issue as finally resolved by the trial court was wholly one of fact. * * *"

It is respectfully submitted that Petitioner Miller failed in the lower court to present clear and convincing evidence of fraud; hence, that the court was correct in refusing to set the judgment aside.

The Court in *Saenz* v. *Kenedy,* 178 F. 2d 417, cogently summed up the law, and stated the position taken by the Respondent in this case, when it said:

> "We are fully aware of the salutary rule that courts can and should set aside any judgment or decree that was procured by fraud, but we are also aware of the fact that fraud is never presumed and must always be proven by clear and convincing evidence. * * *"

See, also, in this connection *Deauville Associates, Inc.* v. *Murrell, et al.,* 197 F. 2d 91.

The petitioner is now attempting again to prove fraud on the Court by attacking the personal record which Cuthill kept of the number of hours he worked overtime. But the real issue is not whether Cuthill's claim was a sound one in fact, or even in law, but whether any fraud was committed on the U. S. District Court by proving such a claim before it.

The District Court heard all the evidence the petitioner chose, or was able, to adduce on this matter and concluded:

> "As discussed previously, one of these alleged misrepresentations was that Cuthill had a valid claim for overtime compensation. The facts relating to the type of work performed by Cuthill and as to how the claim for overtime hours was made, have already been related. These facts were testified to by Cuthill, Harvey, Thorpe and Burkey. Significantly, the intervenor [Petitioner Miller] offered no evidence to refute the petitioner's [Respondent Cuthill's] claim of overtime hours worked and Miller himself testified that he believed Cuthill performed extra work under Harvey's supervision." *Cuthill* v. *Ortman-Miller Machine Company, Supra.*

Having failed to sustain his burden in the District Court, the petitioner now assigns as error the refusal of the U. S. Court of Appeals to conduct an "independent investigation" of his charges. This is no more than a request for a new trial before the Court of Appeals sitting as a trial court at which the petitioner would have another opportunity to re-try the case and another opportunity to harass the Respondent.

B. The Court of Appeals Did Not Sanction a Departure from the Accepted and Usual Course of Judicial Proceedings.

The petitioner argues that the parties were not "truly adversary" and that the settlement was collusive. After the decision of the U. S. Court of Appeals on the first appeal, *Cuthill* v. *Ortman-Miller Machine Company,* 216 F. 2d 336, the petitioner was given the fullest opportunity, as shown in our Concise Statement of the Case, to present evidence substantiating his allegations to the U. S. District Court, which after hearing all the evidence offered by the petitioner, said of these charges:

> "The intervenor's charges of fraud and collusion between the parties and counsel cannot stand up beside this evidence of the adversary attitude of the parties and their counsel from the time the complaint was filed until their appearance in Court on December 21, 1953." *Cuthill* v. *Ortman-Miller Machine Company, Supra.*

Upon appeal, the U. S. Court of Appeals said:

> "This Court can find no evidence that would indicate in the slightest degree that the settlement was not legitimate." *Cuthill* v. *Ortman-Miller Machine Company,* 249 F. 2d 43.

Certainly settlement of a case by adversary parties before trial and their agreement to entry of judgment by the U. S. District Court is not unusual and cannot be regarded, in absence of proof of fraud, as a departure from the accepted and usual course of judicial proceedings.

C. The Decision of the Court of Appeals Does Not Contravene This Court's Decision in Price v. Gurney

The petitioner asserts that he was not allowed to intervene and defend the Corporation against Cuthill's claim and that such refusal contravened the law as stated in *Price* v. *Gurney, et al.,* 324 U. S. 100. To the contrary, the Respondent submits that Petitioner Miller was permitted to intervene in this cause (see *Cuthill* v. *Ortman-Miller Machine Company,* 216 F. 2d 336, 7 Cir. 1954) and by this action has frustrated for nearly five years the payments of overtime justly due to Respondent Cuthill. After five full days of hearing before the District Court in 1955, no sophistry can obscure that fact that petitioner has intervened, and further, that he has failed to sustain the burden of his charges.

The petitioner apparently believes that even though he has failed to prove his charges, he should nevertheless be

entitled to supersede the corporate management and take over the defense of the corporation against Cuthill's claim. He adds that the "corporation had a good defense which its attorney, Thorpe, did not assert on December 21, 1953 when the judgment was entered." This allegation, which the petitioner has made repeatedly since December 22, 1953, was an issue before the District Court in 1955. At that time, the petitioner Miller, not only failed to offer evidence refuting Cuthill's claim, but even testified that he believed Cuthill performed extra work under the supervision of the Company's external auditor Harvey.

The petitioner has attached to his brief as Appendix "A" a copy of the running record which Cuthill kept of his overtime hours, which he says "conclusively demonstrated that Cuthill perpetrated a fraud in the Court." However, the fact that this indicates that Respondent Cuthill worked an average of 70 hours per week during the period for which he claimed overtime does not discredit his claim. In *Joseph* v. *Ray*, 139 F. 2d. 409, an employee was permitted to recover statutory overtime when the evidence showed that he had worked 70 hours per week. In *Caperna* v. *Williams-Bauer Corp.*, 53 NYS 2d 295, the employee's evidence as to the number of hours of overtime worked rested solely upon his memory, and from his memory he testified that he never worked less than 72 hours per week throughout the entire period of his employment. This testimony was held sufficient to allow recovery. In another case the Court held that an employee's *oral testimony that he worked 75½ hours per week* was sufficient to sustain the trial court's finding to that effect. *Porter* v. *Poindexter*, 158 F. 2d 759.

In *Carstarphen* v. *Windley*, 112 F. Supp. 692, the Court held that an employee's tabulation of hours worked, which he had kept during the period for which he made his claim, in the absence of the production of any record by the em-

ployer to refute the employee's claim, was sufficient to support the employee's claim that he had worked overtime hours for which he was not paid.

In view of the evidence of Cuthill's claim, the mere fact that the Ortman Miller Machine Company preferred to settle on December 21, 1953 can hardly be considered to have been made in bad faith; a more plausible conclusion is that the corporation believed the settlement to be in its best interests.

CONCLUSION.

Respondent Scott Cuthill respectfully submits that the petitioner has failed to advance any special or important reason why this Court should grant the writ, nor has the Court of Appeals sanctioned any departure from the accepted and usual course of judicial proceedings. The Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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